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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Deferral of Licensing of MTA)
Commercial Broadband PCS)

GN Docket No. 93-253
ET Docket No. 92-100

To: The Commission

DOCKET FILE COPY ORIGINAL

OPPOSITION TO APPLICATION FOR REVIEW

BellSouth Personal Communications, Inc. ("BPCI") hereby opposes the "Application for Review" filed by the National Association of Black Owned Broadcasters, Percy E. Sutton, and the National Association for the Advancement of Colored People (collectively "Petitioners") of an *Order* denying their request that the Wireless Telecommunications Bureau ("Bureau") stay MTA PCS licensing. *Order*, DA 95-1410 (W.T.B. June 23, 1995).

The Application for Review should be dismissed because it is an untimely petition for reconsideration of *Implementation of Section 309(j) of the Communications Act, Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd. 5532, *recon.*, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd. 6858 (1994). Additionally, Petitioners have failed to meet the requirements for a stay: they are unlikely to succeed on the merits of their Application for Review; they are not irreparably harmed by the *Order*; a stay would result in substantial harm to others; and the public interest would not be served by grant of the stay. *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

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I. STATEMENT OF INTEREST

BPCI was a participant in the Block A and B PCS auctions and was the high bidder for the Charlotte-Greensboro-Greenville-Raleigh (Market 06) and Knoxville (Market 44) MTAs. As an auction winner, BPCI timely submitted Form 600s requesting authorization to provide PCS service in these MTAs. These applications were granted in June 23, 1995. *Deferral of Licensing of MTA Commercial Broadband PCS*, PP Docket No. 93-253, *Order*, DA 94-1410. BPCI paid more than \$82,056,001 for its two PCS licenses.

II. THE APPLICATION FOR REVIEW SHOULD BE DISMISSED AS AN UN-TIMELY PETITION FOR RECONSIDERATION OF THE FIFTH REPORT AND ORDER IN THE AUCTION DOCKET

Petitioners argue that the Commission should defer Broadband A and B Block PCS licensing because of the substantial headstart these licensees will have over C Block licensees. *See* Application for Review and Request for Stay ("Petition"), filed May 12, 1995, at 10, 17-19; Application for Review ("Application"), filed July 21, 1995, at 10, 15-16. Specifically, Petitioners assert that designated entities will lose access to capital, distributors, and retailers and also will be unable to obtain prime base station cell sites. *Petition* at 18-19; *Application* at 15-16. These issues were previously rejected by the Commission and the deadline for reconsideration has lapsed. *See Implementation of Section 309(j) of the Communications Act, Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd. 5532, 5546-48, *recon.*, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd. 6858, 6863-64 (1994).

Further, Petitioners argue that a stay is warranted because the Commission violated its duty under Section 309(j) by not providing minority preferences in all PCS Blocks. Petitioners fully acknowledge that they previously presented this argument to the Commission, which

rejected it in the *Fifth Report and Order*, 9 FCC Rcd. at 5536. Petition at 17. The Commission again rejected this argument on reconsideration. See *Implementation of Section 309(j) of the Communications Act, Competitive Bidding*, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd. 403, 414-15 (1994).

II. PETITIONERS FAIL TO SATISFY THE REQUIREMENTS FOR A STAY

Not only is the Application for Review an untimely attempt to get reconsideration of the *Fifth Report and Order* in PP Docket No. 93-253, it also fails to satisfy the four pronged test for a stay. Under this test, Petitioners must show that (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm if the stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of the stay. *Holiday Tours, Inc.*, 559 F.2d at 843; *Virginia Petroleum Jobbers*, 259 F.2d at 925.

A. Petitioners Are Unlikely to Prevail on the Merits

Petitioners claim that they are likely to prevail on the merits because licensing the A and B Blocks prior to conducting auctions for the C Blocks would violate Section 309(j) of the Communications Act. Petition at 16; Application at 17-19. Petitioners misconstrue Section 309(j).

Section 309(j) requires the Commission, in designing auction methodologies, to consider and balance the following objectives: (1) the development and rapid deployment of new technologies, such as PCS, without administrative and judicial delays; (2) the promotion of economic opportunity and competition by avoiding excessive concentration of licenses; (3) efficient and intensive use of the electromagnetic spectrum; and (4) recovery of value for the spectrum. See 47 U.S.C. § 309(j)(3). Nothing in the statute requires the FCC to give more

weight to one of the objectives over another. In fact, by proceeding with the A and B Block auctions, the Commission has furthered three of the four objectives: rapid deployment; promoting efficient and intensive use of the spectrum; and recovery of value for the spectrum. *Id.*; see *Deferral of Licensing of MTA Commercial Broadband PCS*, GN Docket No. 93-253, *Order*, DA 95-806 (W.T.B. Apr. 12, 1995). Petitioners would upset this balanced result by elevating one of the Congressional objectives, promotion of economic opportunity, above all the others.

The Commission has already satisfied three of these statutory goals and will satisfy the final goal of promoting economic opportunity as soon as the C Block auctions commence.¹ The Bureau properly found that “the Commission’s decision to proceed with the first phase of PCS licensing before subsequent auctions were conducted or scheduled demonstrates that it considered prompt licensing of PCS to be *paramount* even though the timing of future auctions remained unknown.”² Grant of Petitioners’ stay request would frustrate this objective.

The Commission clearly satisfied the statutory objectives, albeit not all at the same time. Moreover, a Commission decision to defer A and B Block licensing until minority enterprises were able to take advantage of the C Block auctions, this decision would likely be unconstitutional under *Adarand Contractors, Inc. v. Peña*, 115 S.Ct. 2097 (1995). Because the statute must be construed in a constitutional manner, the Commission has already changed its rules to facilitate the entry of minorities, women, and small businesses in a manner that does not include race or gender preferences. Moreover, it is questionable whether the Commission could defer

¹ Although small businesses, women, and minorities were not given preferences in the A and B Blocks, there was economic opportunity because of open eligibility.

² *Order*, DA 95-806, at 3 (released Apr. 12, 1995) (emphasis added).

licensing of the A and B blocks simply to equalize the competitive position of smaller companies (including companies owned by women and minorities). *See Hawaiian Telephone Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974).³

B. Petitioners Will Not Suffer Irreparable Harm

Petitioners claim that they will suffer irreparable harm if a stay is not granted because the A and B Block licenses will receive a headstart advantage. Petition at 10-11, 18-19. Petitioners submit no economic analysis, however, to support their claims. Further, the Commission has previously rejected the argument that PCS auctions be held simultaneously to prevent A and B Block licensees from receiving a headstart advantage. *See Implementation of Section 309(j) of the Communications Act, Competitive Bidding*, PP Docket No. 93-253, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd. 6858, 6863-64 (1994). In fact, a headstart does not result in irreparable harm. McCaw, for example, became the largest cellular provider despite a headstart by wireline telephone companies. Finally, “mere injuries, however substantial, in terms of money, time and energy expended in the absence of a stay are not enough” to warrant extraordinary relief. *Virginia Petroleum Jobbers*, 259 F.2d at 925.⁴

C. Interested Parties Will Be Harmed By Grant Of A Stay

If a stay is granted, A and B Block auction winners, such as BPCI, and their potential customers will clearly be harmed. These entities submitted approximately \$1.4 billion in

³ Nothing in the statute *requires* that licenses be awarded to women, minorities, and small businesses. In fact, such a requirement would be highly suspect under *Adarand*.

⁴ Petitioners recklessly speculate, without any evidentiary support, that they have been irreparably harmed by an unlawful territorial allocation by various auction participants. Petition at 11; Application at 11-12. Petitioners provide no concrete evidence to support this allegation, however.

deposits to the FCC prior to the Bureau's denial of the motion for stay. Subsequently, these entities submitted the full price for their licenses, totalling almost \$8 billion. None of this money earns interest. The delay associated with a stay will thus impose a direct economic penalty on these companies. Moreover, the A and B Block winners have made significant start-up investments that can not be recouped until the systems are placed in operation. Thus, a stay also would impose very substantial costs on these companies.

D. Grant of A Stay Would Disserve The Public Interest

A stay would disserve the public interest because it would deny the public the prompt availability of new services that the A and B Block winners are preparing to offer. The very first public interest objective enunciated by the statute is "the development and *rapid deployment* of new technologies, products, and services for the benefit of the public, including those residing in rural areas, *without administrative and judicial delay*." 47 U.S.C. § 309(j)(3)(A) (emphasis added). Any stay of the A and B Block auctions, which have already concluded, will contravene this Congressional objective.

Moreover, if the stay were granted, the Commission would be obligated to return almost \$8 billion in payments that the auction winners provided for their licenses. Depriving the treasury of this sum clearly would not serve the public interest.

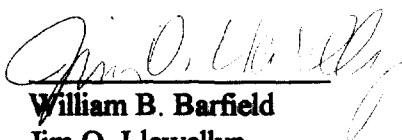
CONCLUSION

Based on the foregoing, BPCI respectfully requests that the Application for Review and underlying request for stay be denied.

Respectfully submitted,

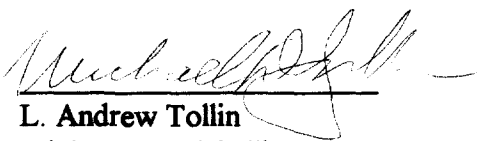
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I, Donna Crichlow, a secretary in the law firm of Wilkinson, Barker, Knauer & Quinn, do hereby certify that a copy of the foregoing Opposition to Application for Review was served this 10th day of August, 1995 to the following by first class mail, postage prepaid:

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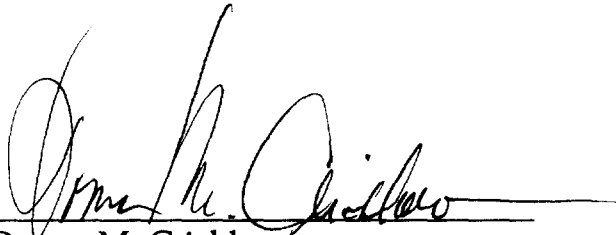
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